

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**



*Original with Affidavit  
of Mailing*

**74-2317-8**

To be argued by  
RICHARD APPLEBY

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**  
Docket No. 74-2317-8

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UNITED STATES OF AMERICA,

*Appellee,*

—against—

CARLOS BAEZA and ALFONSO MELO OBANDO,

*Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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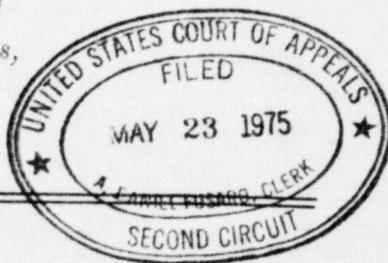
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**BRIEF AND APPENDIX FOR THE APPELLEE**

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*3*

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**Preliminary Statement**

Carlos Baeza and Alfonso Melo Obando<sup>1</sup> appeal from judgments of conviction of the United States District for the Eastern District of New York (Mishler, *Ch. J.*), entered on October 4, 1974 with respect to appellant Obando and entered on March 14, 1975 with respect to appellant Baeza.<sup>2</sup> Appellants were convicted, after a jury trial, of conspiring to knowingly and intentionally possess cocaine with intent to distribute and to import into the United States large amounts of cocaine, in violation of Sections 846, 963, 952(a), 960(a)(1) of Title 21, United States

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<sup>1</sup> Co-defendant Alfredo Vargas Vega's appeal was dismissed on April 22, 1975 by order of this Court.

<sup>2</sup> The other defendants are: Juan Osorio, a/k/a "Coco", Gilberto Morales, Victor Contreras, John Doe, a/k/a "Lucho", John Doe, a/k/a "Jose", John Doe, a/k/a "Juan", and Enrique Munoz.

Code. Seven other co-conspirators were named as defendants in the indictment, all of whom are presently fugitives, with the exception of Gilberto Morales and Victor Contreras who have been arrested by Canadian and Mexican officials respectively.

On October 4, 1974 Judge Mishler sentenced Obando to two years imprisonment and an unsupervised special parole term of 10 years, with the special condition that he not re-enter the United States or its territories during the period of his special parole term. On March 13, 1975 Judge Mishler sentenced appellant Baeza to eight years imprisonment and a special parole term of ten years, with the special condition that he not re-enter the United States or its territories during the parole term. Obando's period of incarceration will expire on June 2, 1975. Appellant Baeza is presently serving his prison sentence.

On appeal, appellant Obando asserts as the one ground for reversal of his conviction that the evidence was insufficient. Appellant Baeza also asserts only one ground for reversal: pursuant to the authority of *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), *pet. for rehearing en banc denied*, 504 F.2d 1380 (2d Cir. 1974) the district court should have declined personal jurisdiction over him since he was forcibly brought to the United States through the efforts of American agents and in violation of Chilean law.

### Statement of Facts

Carlos Munoz, a Chilean national, was the Government's key witness against appellants. Munoz is presently a liaison officer between the Chilean Government and the United States (280).<sup>3</sup> During the period of the conspiracy, from

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<sup>3</sup> All page references are to the trial transcript unless otherwise indicated.



on or about July 1, 1972 through November 18, 1973, Munoz acted in an undercover capacity, frequently reporting his activities to Canadian and American officials. In substance, Munoz testified that on two separate trips to Montreal and New York respectively, and at the direction of Carlos Baeza and Juan Osorio, he delivered suitcases containing cocaine. As a result of Munoz' cooperation with Canadian and American officials, the recipients of those suitcases, Gilberto Morales, Obando and Vega were arrested with large quantities of cocaine.

### **1. The first delivery**

In June of 1973 Munoz met Manuel Riquelme in Valparaiso, Chile (281). Riquelme asked Munoz if he would be willing to travel from Santiago, Chile to Canada or the United States (290). Approximately a week later, Riquelme and Munoz travelled to appellant Baeza's house at 862 Islandia Street in Santiago, Chile where Riquelme introduced Munoz to Baeza and to Juan Osorio. There, Baeza and Osorio examined Munoz' passport and other travel documents. Apparently satisfied with Munoz' credentials, Baeza and Osorio enlisted Munoz to carry two suitcases from Santiago, Chile to Canada (300).

Although Baeza and Osorio did not inform Munoz of the contents of the suitcases, they did state that the merchandise was valuable and that another individual would be traveling from New York to Canada to pick up the two suitcases. Munoz was also told by Baeza and Osorio that arrangements had previously been made with Chilean customs authorities and that no resistance would be encountered (301). Osorio and Baeza agreed to pay Munoz \$2,000 plus expenses for the trip from Santiago to Canada. At the conclusion of the meeting, Baeza and Munoz exchanged telephone numbers and agreed to keep in constant touch (320).

After Munoz left Baeza's house, Munoz reported his activities to the Canadian Embassy in Chile. Munoz and the Canadian officials agreed to maintain close contact (310).

Approximately ten days after this first meeting, in the last week of June, 1973, Munoz again met with Baeza and Osorio at Baeza's house, at which time Munoz was given \$700 plus expense money. Munoz was told that he was to carry two suitcases and that he should arrange air transportation to Montreal, Canada. Again, after this meeting Munoz reported his activities to officials of the Canadian Embassy (316). On July 2, 1973 Canadian officials thereafter introduced Munoz to officials of the American Embassy in Santiago who were apprised of Munoz' previous meetings with Baeza and Osorio (323).

On July 16, 1973, before he left for Canada, Munoz met with Osorio and Baeza in Santiago. Osorio told Munoz that the plans had been changed and that Munoz was now to fly to Montreal via England rather than directly to Montreal. In Santiago, on August 3, 1973, Munoz received two empty suitcases from Baeza. After Munoz filled the suitcases with clothes, Baeza drove Munoz to the airport (340). There Baeza instructed Munoz that he should register at a hotel in Montreal and then immediately telephone Osorio in Santiago. Baeza's and Munoz' movements at the airport were surveilled by Charles Cecil and other Drug Enforcement Administration (DEA) agents (686).

Munoz boarded the plane bound for Montreal via London and Toronto. At each stop-over Munoz was surveilled by law enforcement officials. Upon registering at the Sheraton Mount Royal Hotel in Montreal on August 5, 1973, Munoz was met by Royal Canadian Mounted Police. The Royal Canadian Mounted Police examined the suitcases and determined that the inner linings of the suitcases contained cocaine (349). Munoz then telephoned Osorio in Santiago



and told him he was staying at the Sheraton Mount Royal Hotel. Osorio told Munoz that on the following Tuesday an individual would be arriving from New York to pick up the two suitcases (350).

On August 7, 1973 Osorio telephoned Munoz in Montreal to tell him that a second individual had departed from Chile and would be arriving in Montreal the next day with another two suitcases (365). Osorio told Munoz to get \$1,000 from the person who would be arriving from New York and to give \$700 of that amount to the person who would be arriving from Chile. Munoz was told he could keep the remaining \$300 (365).

Later that day a man who told Munoz that his name was Jose, and who was later identified as Gilberto Morales, telephoned Munoz to arrange a meeting for that day in the coffee shop of the Sheraton Mount Royal (622). Later that day they met. Munoz told Morales that another person would be arriving the next day with two more suitcases. As directed by Osorio, Munoz asked Morales for \$1,000 (369). Morales then registered at the Sheraton Mount Royal and had Munoz bring to his room the two suitcases.

On August 8, 1973 "the man from Chile" arrived. Munoz learned his identity to be Victor Contreras. Contreras was carrying two suitcases identical to the ones Munoz had previously carried from Chile. Munoz took the two suitcases from Contreras and in turn brought these other two to Morales' room. Morales thereupon gave Munoz \$1,000, Munoz gave Contreras \$700 and kept \$300 for himself. Later Morales returned two of the four suitcases to Munoz (401). Munoz observed that these suitcases were empty and that the lining had been ripped apart.

Munoz then telephoned Osorio and told him that all had gone according to plan (385). Osorio told Munoz that he was free to leave Montreal. Upon his arrival in San-

tiago on August 15, 1973, Munoz was met at the airport by Baeza, who told Munoz that Morales had been arrested in Toronto and that, as a result, \$150,000 had been lost (388). An officer of the Royal Canadian Mounted Police testified that the two suitcases seized from Morales contained 26 pounds of cocaine secreted within the linings (626).

## **2. The second delivery**

On September 15, 1973 Munoz met with Osorio and Baeza to discuss the possibility of a second trip (392). On this occasion Munoz was instructed to deliver two suitcases to the United States via Toronto and return with \$25,000 to \$30,000. Munoz was instructed to obtain an American visa. Once again, Munoz reported these meetings to DEA agents in Santiago (395).

On November 5, 1973 Munoz met with Baeza at Baeza's house in Santiago. Baeza led Munoz to the rear of his house where Munoz observed two suitcases, identical to the ones he had previously delivered to Montreal, lying open in the sun, apparently in order to dry the cocaine that was secreted within the linings of the suitcases (405). Baeza then instructed Munoz about the details of the trip and gave Munoz the two suitcases, after which Munoz filled them with clothes (407).

Later that day Baeza's chauffeur drove Munoz to the airport. On the way to the airport, the chauffeur gave Munoz a slip of paper with the name of the Newport Hotel and a telephone number written on it. At the airport, Munoz observed Baeza (422). Agent Cecil, who was surveilling Munoz's activities at the airport, also observed Baeza at the airport and photographed him (423).

On November 6, 1973 Munoz arrived in Toronto and registered at the Newport Hotel (425). The next day Osorio telephoned Munoz, informing him that he should

remain in Toronto until the following Friday because the people from New York did not yet have the money (426). During all this time Munoz was in constant contact with the Royal Canadian Mounted Police (430-31). On November 9, 1973 Munoz telephoned Baeza's house and talked to an unidentified woman. Munoz informed her that nobody had come to pick up the suitcases (430). The woman told Munoz to wait because "Carlos" had an accident. After conferring with American agents, Munoz left Toronto for New York on November 13, 1973.

### 3. The arrests in New York

Upon his arrival in Toronto, Munoz went directly to the DEA headquarters in Manhattan and thereafter checked in at the Holiday Inn in Manhattan (472). On November 15, 1973, at the Holiday Inn, and in the presence of DEA agents, Munoz telephoned Baeza's house and spoke to an unidentified man. Munoz told this individual that he was getting impatient and that unless somebody arrived shortly he would leave for Santiago. The man assured Munoz that someone would be getting in touch with him shortly (475). Approximately 45 minutes later Munoz received a call from a "Lucho" informing him that somebody would be arriving shortly to pick up the suitcases (726-29). The conversation was recorded (726; Gov't Exhibit 19).

At about 7:00 P.M. that same day Obando<sup>4</sup> telephoned Munoz. Munoz said: ". . .they called me from Santiago and told me you would get in touch with me". Obando replied: "I, I have just finished talking to them". Obando then asked Munoz whether he "would like one doctor or two doctors to come to see you". Munoz said: ". . . I'm

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<sup>4</sup> No voice identification was made of Obando on Government Exhibits 20 and 21. However, Judge Mishler ruled that the jury could infer that either Obando or Vega made the telephone calls or that these telephone calls were made at their instance (458). Since Obando was convicted, it is a reasonable assumption that the jury did so conclude. But see, 576.

with, with the patients right here". Obando stated: "... what do you think would be best, that one single doctor see you, or two doctors?" (730-31). After Munoz said that one doctor would suffice, he gave Obando his address at the Holiday Inn. The conversation was recorded (Gov't Exhibit 20). Because of a mix-up, however, the meeting did not occur (477).

The next day, November 16, 1973, Obando telephoned Munoz at the Holiday Inn, and explained that he had come to Munoz' hotel the night before but had been unable to get hold of him (478, 737). Obando told Munoz that he would be at the Holiday Inn shortly. The conversation was recorded (Gov't Exhibit 21). Approximately two hours later, Obando called from the lobby of the hotel and said that he was coming up to Munoz' room (478, 742).

Agent Curtis Fillmore, testified to the arrest of the defendant Vargas Vega on the same day, November 16, 1973. He had observed Obando pull up to the Holiday Inn in a green Mustang (462). Almost simultaneously, Vega, driving in a Chevrolet, pulled up next to the Mustang. Vega and Obando looked at one another, acknowledged each other's presence, and proceeded to park their cars (763). Obando got out of his car and stood on the sidewalk. A few minutes later, Vega got out of his car, joined Obando on the sidewalk and engaged him in a short conversation. While conversing, Vega and Obando continually looked up and down the street (767-68). After Obando entered the Holiday Inn, Vega entered his car and proceeded to circle the block several times (769, 777-812). Shortly after the arrest of Obando, Vega was apprehended (811). A cleaner's ticket was seized from the person of Vega, containing the name of the Holiday Inn and its address.

Munoz met the appellant Obando at the door of his hotel room and thereupon showed him the two suitcases. Munoz explained to Obando that the suitcases were empty.



Obando said "It would have been better to bring some clothing to place inside". (480, 568). When Munoz asked for the payment, Obando replied: "I am not the owner of these things, somebody has sent me. I have \$13,000 that I have been given to give to you." Obando then took \$13,000 in \$100 bills from out of his pocket and handed it to Munoz (572). Munoz told Obando that since he had to give the money to some people in Chile he needed a receipt. Obando gave Munoz a receipt for the \$13,000, signing the name of "Alfredo" (873). Obando asked Munoz if he would help him bring the suitcases down to the lobby (480). Munoz and Obando went down to Obando's car, each carrying one suitcase. Obando opened the trunk to his car and, just as he was about to place one of the suitcases into the trunk, was arrested by DEA agents (481). A business card containing the name "Alfredo" was seized from the person of Obando at the time of his arrest (745). Secreted within the linings of the suitcases was approximately 13 pounds of cocaine (792, 800). Obando and Munoz had been surveilled constantly during this time (743).

#### **4. The arrest of Baeza**

After the arrests of Obando and Vega, and after consulting with DEA agents, Munoz telephoned Baeza's house in Santiago (484). Munoz told an unidentified woman that the delivery had been made, that he had received \$13,000 in \$100 bills, and that he was departing for Chile. The conversation was recorded. (Gov't Exhibit 22). The following day, on November 18, 1973, Munoz arrived in Chile and was met at the airport by the defendant "Lucho" who had been told, by either Osorio or Baeza, to pick up Munoz (485). There, Munoz, after deducting \$500 for his expenses, turned over an envelope to Lucho containing \$12,500 (485).

On January 11, 1974 the indictment in this case was filed, whereupon a bench warrant was issued for Baeza.

Soon thereafter, DEA agents advised Chilean officials of the indictment and requested Baeza's arrest. Baeza and others were arrested in Valparaiso, Chile on April 18, 1974 and were incarcerated there until May 4, 1974. On May 2, 1974 the Chilean government expelled Baeza from Chile pursuant to a decree dated May 2, 1974.

Baeza was conveyed to the Santiago airport on May 4, 1974 by the Chilean police. At the airport the Chileans relinquished custody of Baeza to DEA agents. On May 5, 1974 Baeza was taken to West Street, and on May 8, 1974 he was arraigned before the court.

## **5. The Defense**

Appellant Baeza produced four witnesses. The witnesses did not appear in the court room but testified through the use of videotapes, recorded earlier in Chile.

Osorio, an indicted co-defendant, testified that he was associated with Munoz and Baeza in the auto parts business (998). He testified that Munoz approached him and Baeza in order to work for an automobile importing company which he and Baeza had formed. Osorio testified that Munoz had not gone to Canada in connection with narcotics but, instead, to establish connections in the auto parts industry.

Theresa Baeza, the defendant's wife, Laura Baeza, his mother, and Mirta Acra, his sister, testified that at Baeza's house in Santiago in June 1973 Munoz talked with Baeza and Osorio about the auto parts business.

Theresa Baeza also stated that she and her husband had won a lottery in Chile, thus accounting for the cash necessary to buy their home and Baeza's restaurant.

Appellant Obando testified in his own behalf (905). He stated that on the day of his arrest he travelled from



Westchester to Queens in order to get an estimate for some repairs on his car (913). As he was driving down a street in Queens, he heard Vega call out his name. After Obando pulled over to the curb, Vega asked Obando if he would pick up an unidentified man at the Holiday Inn in Manhattan and drive him to the airport. Obando did not ask Vega for the name of the airline nor the departure time prior to going to the Holiday Inn (934). It was agreed that later that day Vega would meet Obando at an unspecified location (917). When Obando arrived at the Holiday Inn he noticed Vega in front of the entrance to the hotel and was surprised to see him (941). Obando had not agreed to meet Vega there previously, (917) nor did he arrive at approximately the same time as Vega (928). When Obando approached Vega, Vega handed him a package, saying "Oh, I forgot to give you this package" (917). Obando went up to Munoz' room and there handed Munoz the package. Munoz opened the package in Obando's presence. It was at this point that Obando realized the packaged contained a large quantity of cash. Obando helped Munoz bring the suitcases down to the lobby, but denied that he knew what was contained inside the suitcases (922).

## **6. The Government's rebuttal**

The Government called Selin Valenzuela in rebuttal. Valenzuela's testimony was limited as against the appellant Baeza (1038). Valenzuela testified that from June 1972 through May 1973, on approximately 10-12 occasions, he delivered on each occasion between 7-10 kilograms of cocaine to Baeza's house in Santiago (1038-1053). Valenzuela, an admitted narcotics trafficker, stated that, in return for his cooperation with the Government, he would be allowed to plead guilty to one of three outstanding indictments against him (1037).

## 7. The post-trial "Toscanino" hearing

On March 11-13, 1975, an evidentiary hearing was held pursuant to *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), *pet. for rehearing en banc denied*, 504 F.2d 1380 (2d Cir. 1974), to determine whether the court lacked personal jurisdiction over Baeza because American agents allegedly forcibly produced Baeza's expulsion from Chile in violation of Chilean law. On March 13, 1975, the court orally denied the motion. On March 27, 1975, a Memorandum Decision and Order was filed *nunc tunc* and may be found at pages A382 through A390 of the Appendix to Baeza's brief.

## ARGUMENT

### POINT I

#### **Proof of appellant Obando's participation in the conspiracy was sufficient to support his conviction.**

Obando claims that there was insufficient evidence against him from which a jury could conclude that he was aware that the scope of the conspiracy was larger than his role in delivering the \$13,000 to Munoz and in picking up the two suitcases filled with cocaine. Obando contends that the evidence does not meet the criteria of the single act doctrine, enunciated in *United States v. De Noia*, 451 F.2d 979 (2d Cir. 1971). In *De Noia*, the Court stated:

"For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which knowledge may be inferred" at 981.

It is submitted that under this criteria it is clear that Obando had knowledge of the broader conspiracy when he went to Munoz' room at the Holiday Inn on November 16, 1973. Simply the amounts of cocaine involved, 13 pounds, and the \$13,000 in \$100 bills, would alone have permitted an inference by the jury that Obando was aware of the fact that the conspiracy was far-reaching and that ultimately the cocaine was to be distributed at the retail level. See *United States v. Stromberg*, 268 F.2d 256, 268 (2d Cir. 1959), *cert. denied*, 361 U.S. 863 (1959).

But there was other corroborating evidence from which the jury could have concluded that Obando was involved in a "chain" conspiracy, that the conspiracy had a "scope" and "that for its success it required an organization wider than may (have been) disclosed by his personal participation". *United States v. Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied* 372 U.S. 959 (1963). First, Obando must have known that the cocaine emanated from South America based upon his conversation with Munoz at the Holiday Inn. There Munoz told Obando: "I am not the owner of these things, somebody has sent me" (480). Munoz asked Obando for a receipt for the \$13,000 "because I have to give this money to Chile and I want to make sure that they know it is \$13,000" (480). Second, Obando himself indicated in his telephone conversation of November 15, 1973 with Munoz (see footnote 4), just one day before he delivered the \$13,000 to the Holiday Inn, that he had just finished talking to the people in Santiago (Gov't Exhibit 20). Based upon all this evidence the jury could easily have concluded Obando knew that he was a link in the chain of a much broader conspiracy to import cocaine from South America and that in order for the cocaine to be transported to the United States and thereafter distributed, a division of labor at various functional levels was required.

Finally, Obando argues that since there was no evidence that he actually saw the cocaine secreted within the linings of the suitcases the Government failed to establish that he *knowingly* possessed cocaine. Obando maintains that the most the evidence proved was that Obando knew he was picking up something illegal but that the suitcases could have contained jewelry, counterfeit money, explosives, or other contraband.

This argument was rejected in *United States v. Joly*, 493 F.2d 672, 676-77 (2d Cir. 1972). See also *United States v. Olivares-Vega*, 495 F.2d 827 (2d Cir. 1974). The facts of the instant case on the issue of knowledge are stronger than in *Joly*. The amount of cocaine involved is much greater. The defendant's story could easily have been regarded by the jury as not only concocted but ridiculous. See *United States v. Pui Kan Lam*, 483 F.2d 1202 (2d Cir. 1973) ("As a matter of common sense, the jury was entitled to take into account what appears to us an incredibility inherent in Lam's story" at p. 1208). Vega's and Obando's tandem arrival as well as their furtive movements in front of the Holiday Inn create an inference of knowledge. Obando's telephone calls to Munoz' hotel room in which he was obviously using code names. Obando's statement to Munoz that it would have been better to fill the empty suitcases with clothing, further support this inference. These facts not only permitted but really compelled a finding by the jury that Obando knew what was in the suitcases.

## POINT II

**The District Court acquired personal jurisdiction over the appellant Baeza.**

Appellant Baeza contended at the post-trial evidentiary hearing that he was brutally tortured by the Chilean Police with the knowledge and assistance of DEA agents. Appellant argued that the actions of American agents were so



shocking that the district court should have declined personal jurisdiction over him, pursuant to *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), pet for rehearing en banc denied, 504 F.2d 1380 (2d Cir. 1974). In its Memorandum Decision the district court expressed doubts whether Baeza even had a right to a hearing "since the defendant's testimony concerning participation by United States agents is rejected as incredible" (Memorandum Decision and Order, dated March 27, 1975; Baeza's Appendix p. A382). Nevertheless, resolving any doubt in favor of Baeza, the court, in rejecting Baeza's claim, went on to make specific findings of fact:

1. "Neither (Charles) Cecil (of the DEA) nor any other United States government agent requested Baeza's arrest." Baeza's Appendix, p. A383.

2. "The court rejects the testimony of (Agent) Cecil's involvement (in torture) as incredible and accepts Cecil's version of his visit to Investigation Headquarters on November 9, 1973." Baeza's Appendix, p. A385.

3. "At no time did (Baeza) complain to the doctor aboard the plane (which transported Baeza from Chile to the United States), to medical personnel at West Street, or to the district judge at the time of arraignment, of any mistreatment during either incarceration in Chilean jails." Baeza's Appendix, p. A387.

4. Baeza told Ivan Fischer (his attorney) "the details of the torture only two days before (the) evidentiary hearing on the jurisdictional question (on March 11, 1975)." Baeza's Appendix, p. A387.

Baeza does not contend that Judge Mishler's findings are erroneous. However, Baeza argues that jurisdiction was not acquired over him, in any event, because Chile did not grant Baeza a choice as to which country he wished to be expelled, as required by Chilean law. See Baeza's Ap-

pendix, p. A391. The United States, in requesting Baeza's arrest, so the argument goes, aided and abetted this violation and thereby engaged in such lawless conduct as to deprive the district court of jurisdiction. *United States v. Lira*, — F.2d — (2d Cir. slip opinion p. 2871-2880, decided April 14, 1975) rejected this same argument.<sup>5</sup> In *Lira* this Court held that in determining jurisdiction it is irrelevant whether Chile violated its own laws. This Court stated:

"Appellant's final argument is that Chilean law was violated when the Chilean Government issued an expulsion decree directing that he be sent to the United States. However, since Chile was aware of the alleged violations on the part of its own officials and did not object or take remedial action, this argument is of no avail to appellant. See *United States ex rel. Lujan v. Gengler*, supra, at Slip Opin. 1206-09. Furthermore, in dealing with a foreign government, the DEA agents were entitled to rely on that government's interpretation and enforcement of its own laws. The United States Government did not owe appellant any obligation to enforce his asserted right under Chilean law." *United States v. Lira*, supra, slip op. at p. 2880.

Baeza also claims that the failure of the United States to seek extradition of him, either on the basis of treaty or on the basis of comity, constitutes such lawlessness that the district court should have declined jurisdiction. This argument is also without merit since article 2 of the Extradition Treaty between Chile and the United States does not permit extradition for narcotics offenses. See Baeza's Appendix at p. A398. In construing this same treaty, this Court in *Lira*, supra, stated: "Under the Extradition

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<sup>5</sup> The *Lira* case was decided before the appellant Baeza submitted his brief.



Treaty between the United States and Chile, a Chilean national . . . cannot be extradited to the United States" at p. 2873, Fn. 1.

Comity is available only when, although not so specifically provided, the treaty itself permits extradition for a particular crime. See *Fiocconi v. Attorney General*, 339 F. Supp. 1242 (S.D.N.Y. 1972), *aff'd on other grounds*, 462 F.2d 475 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972). Here the treaty would not permit comity. In any event, as noted in *Lira (id.)*, even if comity had been theoretically feasible, "the United States Government did not owe (Baeza) any obligation to enforce his asserted right (to comity) under Chilean law". Moreover, the determination not to employ comity in order to obtain a defendant's presence arises in the sensitive context of foreign relations between the surrendering and receiving countries and should not be judicially reviewable. See *Fiocconi v. Attorney General*, 462 F.2d at 477-78 *supra*.

## CONCLUSION

**The judgments of conviction should be affirmed.**

Respectfully submitted,

May 21, 1975

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Of Counsel.

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**APPENDIX**

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## GOVERNMENT EXHIBIT 20

Transcript of a telephone conversation held on November 15, 1973 at 7:05 P.M. between Carlos Munoz and an unidentified male. Conversation was held in Spanish.

Munoz: Hello.

Male: Hello, delighted, is this with Carlos?

Munoz: Yes, good afternoon.

Male: Who else?

Munoz: I'm alone here.

Male: Yes, yes, yes, I know. You know who is speaking, you know my name, don't you?

Munoz: Yes, of course.

Male: Because . . .

Munoz: No, I don't have . . . But they called me from Santiago and told me you would get in touch with me.

Male: I, I have just finished talking to them.

Munoz: Yes.

Male: Okay then, would you like one doctor or two doctors to come to see you?

Munoz: Eh, look, I'm with, with the patients right here.

Male: Yes, I know that you have the patients.

Munoz: Yes.

Male: But, do you need . . . what do you think would be best, that one single doctor see you, or two doctors?

Munoz: No, just one, no more, that's all.

Male: Okay, can you give me that address there?

Munoz: Of the Hotel?

Male: Yes.

Munoz: Just a second, I'll check it here, in the . . .

Male: Okay.

Munoz: It's on, on 440 West.

Male: Wait, wait, 440.

Munoz: Yes.

Male: What more?

Munoz: West.

*Government Exhibit 20*

Male: Yeah.

Munoz: of 57th Street, 57th Street.

Male: Yeah.

Munoz: And it's here in New York.

Male: Yes, yes, yes, I know, I . . . and where is this, man?

Munoz: It's between 9th Street—Avenue between 9th and 10th.

Male: Whereabouts? In Queens, Bronx, Manhattan?

Munoz: It's in Manhattan . . . in Manhattan.

Male: Yeah.

Munoz: On 57th, where there is, let's see, do you know where Carnegie Hall is?

Male: What? It's around where what is?

Munoz: Carnegie Hall.

Male: Carnet?

Munoz: Yes, there; where they have the operas and such things.

Male: Oh yeah. What's the name of that . . . ?

Munoz: Holiday Inn.

Male: That's the hotel.

Munoz: Yes, the Holiday Inn.

Male: Fine, Inn?

Munoz: Inn, yes, Holiday Inn.

Male: Spell it.

Munoz: I N N.

Male: Yeah, house.

Munoz: Holiday Inn.

Male: So it's four.

Munoz: Let's see, read it back to me.

Male: 440.

Munoz: Yes.

Male: West.

Munoz: West.



*Government Exhibit 20*

Male: Of 57th Street.

Munoz: Yes, that's it.

Male: Of 57th Street.

Munoz: Yes.

Male: Okay.

Munoz: At what time do you think you might be here?

Male: What time is it?

Munoz: It's ten minutes past seven.

Male: Seven, at, at a quarter to eight I'll let you know.

Munoz: At a  $\frac{1}{4}$  to 8, you'll let me know.

Male: Yes, I'll let you know, if I'm near by or if I've already sent or whatever, okay?

Munoz: Okay.

Male: It's just that I would have to call you anyway for the name of the . . .

Munoz: Of the person.

Male: Of the Doctor, Yes.

Munoz: Yes, of the doctor.

Male: You have now recovered from your illness, from that pain you had?

Munoz: Yes, everything is fine.

Male: Okay, I'm glad.

Munoz: But, maybe you'll bring me the medicine so that I get better.

Male: It's just that, with the patient unless the medicine is brought over, he can't be encouraged.

Munoz: That's right.

Male: Okay.

Munoz: It has to be taken to him.

Male: So long then.

Munoz: Fine, very well.

Male: Cia, then.

Munoz: That's it.





STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

two copies

That on the 23rd day of May 19 75 he served a copy of the within

Brief and Appendix for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

George Sheinberg, Esq.

Fisher, Rosner and Scribner, Esqs.

66 Court Street

401 Broadway

Brooklyn, N. Y. 11201

New York, N. Y. 10013

and deponent further says that he sealed the said envelope and placed the same in the mail chute  
225 Cadman Plaza East  
drop for mailing in the United States Court House, ~~Washington Street~~, Borough of Brooklyn, County  
of Kings, City of New York.

*Lydia Fernandez*  
LYDIA FERNANDEZ

Sworn to before me this

23rd day of May 19 75

*Martha Scharf*

MARTHA SCHARF  
Notary Public, State of New York  
No. 243480350  
Qualified in Kings County  
Commission Expires March 30, 1977